UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

RISING DEVELOPMENT BPS, LLC
Employer

- and - **CASE NO. 2-RC-23250**

LOCAL 890, LIFE
Petitioner

DECISION AND DIRECTION OF ELECTION

Rising Development BPS, LLC, owns and is the managing agent for a number of properties throughout the New York City metropolitan area. The five residential properties at issue in the instant case are located on one block in the Bronx. Local 890, LIFE, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act. The petitioned-for unit includes all full-time and regular part-time porters and maintenance employees, but excluding all office clerical employees, guards and supervisors as defined in the Act.

Upon the petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter[1] and in accordance with the discussion below, I conclude and find as follows:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.

2. The parties stipulated and I find that Rising Development BPS, LLC, herein the Employer, a corporation with its principal office located at 3261 Broadway, New York, New York, is engaged in ownership and operation of residential apartment buildings located at 922-926, 932, 940 and 946-950 Bronx Parkway South, and 2137 Vyse Avenue, Bronx, NY, the only facilities involved herein. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of $500,000, and purchases and receives at its Bronx, NY, locations, goods and materials

[1] The briefs filed by the parties herein have been duly considered.

valued in excess of $5,000, directly from suppliers located outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that Local 890, LIFE, herein Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. At the outset of the hearing, Petitioner amended its petition and seeks to represent all full-time and regular part-time porters, handymen and the superintendent, excluding office clerical employees, professionals, guards and supervisors as defined by the Act.

As evidenced at the hearing and in the briefs, the parties disagree on the scope of the unit and whether the superintendent should be excluded from the unit as a supervisor. Petitioner maintains that, in addition to the close geographic proximity of the five buildings encompassed by the petitioned-for unit, the record establishes a sufficient community of interest among the employees based on common supervision, similar skills, employee interchange and an employee manual applicable to all petitioned-for employees. With respect to supervisory status, Petitioner argues that the superintendent, Fernando Negron, regularly performs the same basic repair work as the handymen at all five buildings.

The Employer, to the contrary, asserts that three separate units are appropriate because the units should be grouped by the buildings assigned to each of the three porters. Specifically, the Employer maintains that the buildings cleaned by Silvano Montez, located at 946-950 Bronx Park South and 2137 Byse Street, comprise one unit; the buildings cleaned by Raphael Vasquez, located at 932 and 940 Bronx Park South, comprise another unit; and, the building cleaned by Zuma Rivas located at 922-926, comprises the third unit. Further, the Employer contends that the superintendent should not be included in any unit found appropriate because he has the authority to effectively recommend hires and discharges, and he assigns work. Based on these indicia, the Employer claims that the superintendent is a supervisor as defined in the Act.

I have considered the evidence and the arguments presented by the parties on these issues, and as discussed below, I find that the unit petitioned-for by the Petitioner is an appropriate unit because the record demonstrates that the employees share a sufficient community of interest. Further, I find that the Employer has failed to carry its burden that the superintendent possesses supervisory indicia and therefore, I therefore find that this position should be included in the unit. To provide a context for my discussion, I will first provide an overview of the Employer's operations.

I. THE EMPLOYER'S STRUCTURE

Rising Development owns all of the buildings in issue in the instant case. Hanna Hanna is the managing agent for the residential properties in the Bronx encompassed by the instant petition. In addition, he manages the properties for the Employer that are located in Yonkers. The office manager, Ramona Ramos, who is employed by a related

entity called Rising Management, performs overall supervision and reports directly to Hanna. She primarily handles the paperwork associated with running the building, such as, leases, rent collection, notices of non-payment and work orders. Because the properties are designated as New York City House Authority Assistance (NYCHAA), managing the rent collection is more complicated than the typical rental because monthly payments are split payments between the City and the tenants. City inspectors investigate any reported code violations, which could result in a suspension of rent until the violations are corrected. Ramos handles complaint calls from tenants and is responsible for having any violations removed for all five buildings.

Presently, seven employees clean and maintain the buildings: three full-time porters, one part-time porter, two handymen and the superintendent, Negron. Hanna testified that the porters and the handymen report to Negron who reports to both Ramos and Hanna. According to Negron, however, the employees punch in at the manager's office and get their work orders from Ramos. At the end of the shift, the employees punch out at the office and hand their paperwork into Ramos. While Negron is not an hourly employee, he testified that he reports to Ramos and receives his daily assignments from Ramos, just like the handymen

.

II. TERMS AND CONDITIONS OF EMPLOYMENT

The three full-time porters work forty hours per week on a Monday through Friday schedule. The part-time porter covers the weekends, working about twenty hours per week. The two handymen also work forty hours per week on a Monday through Friday schedule. The superintendent regularly works the same hours and schedule as the full-time porters and handymen, except, he is also "on call" after-hours and on the weekends in case of emergencies. Regarding wages, the porters and the handymen are hourly employees who earn between $8.50-$10 and $10.50-$11, respectively. In addition to a free apartment and paid utilities, the superintendent earns a salary of $600 per week.

The porters, the handymen and the superintendent wear a dark blue uniform with their names and the Employer's name on it. The employee handbook, which sets forth various work rules and benefits, applies to all of the employees. Notably, office manager Ramos distributed the employee handbooks and directed the employees to sign them, after which she collected them.

III. FUNCTIONAL INTEGRATION

The buildings are contiguous to each other on the same block. Generally, one management account is used by the Employer to deal with expenses and income, even though, the buildings are taxed separately and billed separately for fuel. While superintendent Negron reads the meters and signs the receipts for the fuel at the time of delivery, Hanna places the orders based on his assessment of need. Each building has separate entry keys and their own locked supply room. While Hanna claimed that each building has its own locker room, Negron testified that no locker room *per se* exists. Instead, the porters have converted the prior superintendent's office into a makeshift cafeteria containing a microwave. All of the employees use this room for lunch.

On a monthly basis, Ramos bundles the work orders and sends them to Hanna. Again, because the buildings are NYCHAA, Ramos oversees these repairs and faxes

documentation to the appropriate agency in order to get the violation removed, thus, enabling the Employer to collect rent.

IV. EMPLOYEE JOB DUTIES AND INTERACTION

The full-time porters are assigned to clean specific buildings. Their work is routine; they wax and mop the common areas, sweep, shovel and de-ice the sidewalk, and handle the garbage. Occasionally, Ramos and Negron have re-assigned porters between buildings, due to an emergency or another porter's absence. The record indicates that the prior office manager routinely reassigned handymen to other jobs in other buildings. In that regard, it does not appear to be in dispute that the handymen regularly work in all five buildings. Similarly, the superintendent works at all five buildings. He ensures that the boilers are functioning by changing and cleaning the filters and that minor repairs are completed. Negron works closely with one of the lesser skilled handymen in order to teach him how to make repairs or change a lock.

V. AUTHORITY OF SUPERINTENDENT

A. Hiring

Hanna claimed that Negron was involved in the recent hire of a handyman by making the case to Hanna that, without additional manpower, they would be unable to stay on top of the necessary repairs throughout the buildings. Upon approval of Hanna's boss (identified only as "Nick" who appears to be one of the Employer's owners), a handyman was hired.

Hanna claimed that Negron recommended his friend, Nelson, who submitted an application and was interviewed by Hanna's assistant, Emil Carnehosa. To the contrary, Negron testified that he recommended two friends for hire – Richard Ortiz and Edwin Bourbos – both of whom, Hanna rejected. Negron further testified that the full-time porter position was filled by the part-time weekend porter who, in turn, effectively recommended a friend as his replacement for the part-time position. Negron claimed that he had no input regarding either of these hiring decisions.

B. Discharge

Hanna claimed that the discharge of a porter named Cecilio, was based on Negron's recommendation. As background, at the beginning of the snow season, Negron distributed forty bags of ice-melting "salt" to each of the buildings. Soon thereafter, Negron discovered that the allotment for Cecilio's buildings was missing. Negron informed Hanna that given the lack of snow, the supplies must have been stolen. The obvious suspect was Cecilio who held the keys to the storage supply room. After Negron reported the incident, Hanna conducted an independent investigation and consulted with Ramos. The record demonstrates that Hanna decided to fire Cecilio because the porter failed to provide any explanation for the missing salt bags. According to Negron, in response to his report that there was a thief on the property, the office manager told him "don't worry about it, I'll deal with it…go do your job."

Hanna also maintained that Negron effectively recommended the termination of Damaras, the prior office manager, and Negron's superior. According to Hanna, soon

after Negron was hired in about August 2007, he complained that Damaras' behavior was erratic and volatile. Hanna claimed that based on Negron's confirmation of prior, similar complaints concerning Damaras, he decided to fire her. Negron, however, denied that he recommended Damaras' termination or that he was involved with the termination decision.

C. *Discipline*

According to Hanna, Negron inspects the buildings and can have a "stern talk" with the porter if the building is not clean or the garbage is not collected in time for pick up. Hanna cited the former porter Cecilio as an example of Negron's exercise of this authority. While the record demonstrates that Negron complained about Cecilio's poor work performance and tardiness, it is not clear whether Hanna acted as a result of tenant complaints. In any event, Hanna issued Cecilio a final verbal warning based on poor work performance. Hanna testified that "[Negron] has to give us his recommendations if [the porters] are not doing their job correctly and based on his recommendations, I will take actions." Further, Hanna conceded that Negron was not evaluated or adversely affected for Cecilio's failure to improve his work performance.

According to Negron, he informed Cecilio that the manager had told him to relay that if Cecilio did not perform the work, the manager would issue a written notice or suspend Cecilio. Negron maintained that he has no authority to issue warnings to employees. He merely informs Ramos of an incident and she either handles the matter or relays the information to Hanna.

Hanna described the discretion that he uses in deciding what actions to take against the employees depending on the infraction. He claimed that his decisional process entails consultation with Ramos and consideration of Negron's report. However, in describing the progressive discipline of a former porter named Maurice, it appears that Hanna discharged Maurice based solely on reports from former office manager Damaras. It does not appear that the superintendent was involved in any way with the porter's discipline or discharge.

D. Assignment of Work

According to Hanna, Negron supervises the staff because he is "my eyes and ears on the floor." Negron inspects the buildings to make sure that the porters are performing their duties and oversees the handymen.

Negron reports to Hanna any repairs that require hiring outside contractors; he does not decide or solicit which contractors to use. While Negron can recommend contractors, Hanna testified that he uses the contractors with whom he has previously done business. Negron signs off on fuel deliveries and checks the receipts to confirm accuracy. He oversees contractors performing work in the building by opening the boiler room or reporting on the work done by contractors in vacant apartments.

While Hanna claimed that Negron orders supplies for the buildings and has the authority to simply sign for items at the local hardware store, Negron testified that his authority to buy supplies is limited to small items required to complete a work order, such as, duct tape. Hanna also suggested that prior to ordering some supplies, such as uniforms, Ramos must approve the expenditure.

According to Hanna, authority to assign work to the handymen is shared between Ramos and Negron. With respect to work orders that are aimed at correcting violations, Ramos is responsible for the work orders and making sure the repairs are done. With respect to the porters, Hanna conceded that their work is "pretty routine" with a "fairly set schedule" for completing their duties. In case of emergencies, such as a flooded basement, Negron can direct the porters and the handyman to perform certain tasks to alleviate the problem.

Regarding work orders that are not generated from violations by the City inspector, Hanna claimed that typically, a tenant contacts Ramos regarding an issue, such as a leaky faucet. Ramos instructs Negron to inspect the apartment and determine whether the job can be handled by the handymen or whether an outside contractor is required. Based on Negron's assessment of the damage, Ramos prepares a work order on the computer and gives it to Negron. While Ramos is "involved somewhat," Hanna claimed that Negron assigns the work based on "what the handyman is doing at the time" and the handyman's experience with the type of repair. In that regard, of the two handymen, one is more capable in the area of plaster, paint and tiling, while the other is more expert at plumbing.

Negron testified that after punching in at the office, the porters disburse because they have a set routine in assigned buildings. Ramos distributes a stack of work orders, consisting of both regular work orders and violations, to Negron and the handymen. The work orders designate the jobs and the apartment number. At lunchtime, they report their progress to Ramos and she decides whether to distribute additional work orders at that time.

D. Transfers and Time Off

Vacation requests are made to Negron and Ramos. After Hanna approves the request, Negron and Ramos coordinate the vacation schedule. Hanna conceded, however, that the porters generally work out coverage among themselves. Regarding isolated time off requests, the employees can notify either Negron or Ramos; Negron must obtain Ramos' approval before granting the time off.

VI. ANALYSIS

A. SCOPE

Section 9(b) of the Act states that the "Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or subdivision thereof." The Act does not require that a unit for bargaining be the only appropriate unit, the ultimate unit, or the most appropriate unit. *J.C. Penney Co., Inc.*, 328 NLRB 766 (1999). Rather, the Act requires only that the petitioned-for unit be appropriate. *Transerv Systems*, 311 NLRB 766 (1993). The unit sought by the petitioning union is a relevant consideration. *Lundy Packing Co.*, 314 NLRB 1042 (1994). The burden is on the party challenging the petitioned for unit to show that said unit is inappropriate; if the unit sought by the petitioning labor

organization is appropriate, the inquiry ends. *P.J. Dick Contracting, Inc.,* 290 NLRB 150, 151 (1988).

In finding the appropriate unit, the Board "is guided by the fundamental concept that only employees having a substantial mutuality of interest . . . can be appropriately grouped in a single unit." *Taylor Bros*., 230 NLRB 861, 869 (1977). The Board considers a number of factors in determining whether a community of interest exists among the employees seeking to be represented. In determining whether a petitioned-for multi-location unit is appropriate, the Board evaluates the following factors: employees' skills and duties; terms and conditions of employment; employee interchange; functional integration; geographic proximity; centralized control of management and supervision; and bargaining history. *Laboratory Corp. of America Holdings*, 341 NLRB No. 140 (2004); *Bashas,' Inc*., 337 NLRB 710 (2002); Alamo *Rent-A-Car*, 330 NLRB 897 (2000); *NLRB v. Carson Cable TV*, 795 F.2d 879, 884 (9th Cir. 1986). See also *Metropolitan Life Insurance Co*., 156 NLRB 1408 (1966).

In the instant case, the Employer relies on several administrative and fiscal policies to assert there should be three separate units. Specifically, the Employer relies on the separate tax assessment and separate fuel deliveries for these buildings. Further, the Employer's proposal of three separate units based on the assigned work location of the three porters fails to address the proper allocation of the handymen and the superintendent who indisputably work throughout all five buildings. The Board has found that an Employer's administrative grouping is not dispositive in determining the appropriate unit. *Sav-On Drugs, Inc*., 138 NLRB 1032 (1962).

As noted above, the five buildings are in close proximity to each other and there is a small number of employees, all of whom share a common break room and engage in daily interaction. Moreover, the Employer maintains a one central office from which it provides common supervision to the employees working in these buildings. There are common labor relations policies, establishes that the employees share a sufficient community of interest and therefore, the petitioned-for unit is appropriate. Based on all of these factors, I find that the petitioned for multi-location unit is an appropriate unit.

SUPERVISORY STATUS OF NEGRON

Before analyzing the specific duties and authority of the employee in issue, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only 1 of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v.* NLRB*,* 176 F.2d 385 (6th Cir.

1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.,* 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp*., 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America,* 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) of the Act is sufficient to establish supervisory status, even if this authority has not yet been exercised. *See, e.g*., *Pepsi-Cola Co.,* 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska,* 334 NLRB 646, 649 at n.8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home,* 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the individuals at issue here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." *Chicago Metallic Corp., 273* NLRB 1677, 1688 (1985). Thus, the ability to give "some instructions or minor orders to other employees" does not confer supervisory status. *Id. a*t 1689. Indeed, such "minor supervisory duties" should not be used to deprive such individual of the benefits of the Act. *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 280-281 (1974)(quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4). In this regard, it is noted that the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. *See, e.g.*, *Vencor Hospital – Los Angeles,* 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital,* 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.,* 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply, 339* NLRB No. 99, slip op. at 2 (2003); *Dean & Deluca New York, Inc.,* 338 NLRB 1046, 1047(2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by "a preponderance of the credible evidence." *Dean & Deluca,* supra at 1047; *Star Trek: The Experience,* 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact "to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact's existence." *In re Winship,* 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. *See*, *Williamette Industries, Inc.,* 336 NLRB 743 (2001); *Michigan Masonic Home,* 332 NLRB at 1409. Moreover, "[w]henever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center,* 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.,* 304 NLRB 193 (1991).

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.,* 348 NLRB No. 37 (September 29, 2006) and two companion cases,

Croft Metals, Inc., 348 NLRB No. 38 (September 29, 2006) and *Goldencrest Healthcare Center,* 348 NLRB No. 39 (September 29, 2006). In these decisions, the Board refined its analysis in assessing supervisory status in light of the Supreme Court's decision in *Kentucky River*, *supra*. In *Oakwood*, the Board addressed the Supreme Court's rejection of the Board's definition of Section 2(11) in the healthcare industry as being overly narrow by adopting "definitions for the term 'assign,' 'responsibly to direct,' and 'independent judgment' as those terms are used in Section 2(11) of the Act." *Oakwood,* supra, slip op. at 3.

With regard to the Section 2(11) criterion "assign," the Board considered that this term shares with other Section 2(11) criteria the "common trait of affecting a term or condition of employment" and determined to construe the term "assign" "to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." *Id*. slip op. at 4. The Board reasoned that, "It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function." *Id*. The Board clarified that, "…choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'" *Id*.

The Board defined the parameters of the term "responsibly to direct" by adopting the definition established by the Fifth Circuit in *NLRB v. KDFW-TV, Inc.,* 790 F.2d 1273, 1278 (5th Cir. 1986). In this regard, the Board quoted the following language from in *NLRB v. KDFW-TV, Inc., supra* at 1278:

> To be responsible is to be answering for the discharge of a duty or obligation…In determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs…Thus in *NLRB v. Adam [&]Eve Cosmetics, Inc.,* 567 F.2d 723, 727 (7th Cir. 1977), for example, the court reversed a Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his Department." *Oakwood,* slip op. at 6 – 7.

In agreeing with the circuit courts that have considered the issue, the Board found that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly." In clarifying the accountability element for "responsibly to direct" the Board noted that, "to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor is he/she does not take these steps." *Id*, at 7.

In *Kentucky River,* the Supreme Court rejected the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." *NLRB v. Kentucky River Community Care, Inc., supra* at 713. Following the admonitions of the Supreme Court, the Board in *Oakwood* adopted a definition of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise….professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood*, *supra,* slip op. at 7. The Board noted that the term "independent judgment" must be interpreted in contrast with the statutory language, "not of a merely routine or clerical nature." *Id*. slip op. at 8. Consistent with the view of the Supreme Court, the Board held that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id*. (citation omitted) However, "…the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id*.

Applying the foregoing standards to the facts of this case, I find insufficient support in the record to conclude that the superintendent is a statutory supervisor. The record does not establish that he exercises supervisory authority with respect to hiring, firing or discipline, or that he effectively recommends such actions. I note that the Employer's assertions of supervisory authority were specifically contested by the testimony of Negron. The Employer offered conclusory testimony with no documentary support for its assertion that the superintendent has any effective role in hiring and discharge determinations. Likewise, no documentary evidence supports that the superintendent disciplined employees. While the Employer asserts that Negron is vested with the authority to issue oral warnings, the evidence establishes that he merely reports poor work or misconduct to Cecilio and this conduct is thoroughly investigated by Ramos and Hanna. Subsequently, Negron merely relays relayed to the employee the action directed by Hanna or Ramos. *Pepsi-Cola Bottling Co*., 154 NLRB 490, 493-494 (1965)(not a supervisor if complaints or reports of inefficiency are investigated independently by higher management). When the record is considered as a whole, the Employer has failed to establish it contention that recommendations of the superintendent have a definite and significant effect on employment status of the porters. The discipline of former porter was implemented at the direction of Hanna based solely on the advice of the former Office Manager Damaras. Regarding Cecilio's work performance, Negron complained about it to Hanna who generally testified that Negron had to give his recommendation before action was taken. Negron refuted this testimony stating that he was instructed to inform Cecilio that the manager would issue a written warning or suspension unless his work performance. Negron denied making any recommendations of discipline and stated that he merely reported conduct of the porters to Ramos. Accordingly, it appears that the superintendent merely performs a reporting function that is not supervisory under the statute as the evidence is insufficient to establish that the superintendent has the authority to effectively recommend discipline.. *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Pepsi-Cola Bottling Co*., 154 NLRB 490 (1965); *Misericordia Hospital Medical Center v. NLRB*, 623 F. 2d 808, 817 fn. 20 (2d Cir. 1980) (authority to do no more than orally counsel and reprimand employees is not supervisory); *Lynwood Health Care Center, Minnesota v. NLRB*, 148 F.3d 1042, 1046 (8th Cir. 1998) (mere authority to effectively recommend warnings that have no tangible

effect on an employee's job status is not sufficient for supervisory status). Further, the record demonstrates that the superintendent was not involved in the recent hiring of a porter and his recommendations regarding the hire of a handyman were rejected by Hanna. Accordingly, the evidence is insufficient to find the superintendent effectively recommends hire.

As with every supervisory indicium, assignment of work must be done with independent judgment before it is considered to be supervisory under Section 2(11) of the Act. Thus, the Board has distinguished between routine direction or assignments of work and that which requires the use of independent judgment. *Laborers International Union of North America, Local 872*, 326 NLRB No. 56 (1998); *Azusa Ranch Market*, 321 NLRB 811 (1996). The Board has held that only supervisory personnel vested with genuine management prerogatives should be considered supervisors, not straw bosses, lead men, setup men and other minor supervisory employees. *Baby Watson Cheesecake*, 320 NLRB 779, 783 (1995); *Mid-State Fruit, Inc.*, 186 NLRB 51 (1970).

Based on the record, any assignments made by the superintendents were minimal and routine in nature and do not require the exercise of independent judgment and, therefore, do not rise to Section 2(11) status. These assignments to porters by the superintendent were not of a type that would constitute the assignment of overall duties. The record establishes that the duties of the porters were established by Hanna and Ramos. In this connection, it is also noted that the porters require no particular instruction; instead, they are merely repeating tasks and duties that they were told to perform when hired. Accordingly, the superintendent's limited role in asking porters to remove graffiti is not the kind of direction that requires independent judgment. *Cassis Management Corporation*, 323 NLRB 456 (1997).

Moreover, the Employer failed to provide any details regarding how often the porters actually break with routine, how much deviation is allowed or how much discretion is actually involved in telling them to perform their assigned functions. *Quadrex Environmental Co*., 308 NLRB 101 (1992); *Somerset Welding & Steel*, 291 NLRB 913 (1988). Rather, the record indicates that the porters perform largely the same duties on a routine basis everyday. Accordingly, the superintendents acted, at most, as leadmen in handing out work orders.

The Supreme Court, in *NLRB v. Kentucky River Community Care*, *supra*, held that an individual who responsibly directs other employees with independent judgment within the meaning of Section 2(11) must have sole or significant authority over the work unit. In that regard, the standard for responsible direction and independent judgment includes evidence that the alleged supervisor has been delegated substantial authority to ensure that a work unit achieves management's objectives and is thus "in charge." Further, the evidence must establish that the purported supervisor is held accountable for the work of others. Finally, the evidence adduced must show that the individual exercises significant discretion and judgment in directing his or her work unit.

Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees. *Property Markets Group*, 339 NLRB 199 (2003). In the instant case, the duties of the handymen predetermined, performed daily and routine. No significant direction of their work is either required or undertaken. *Byers Engineering*,

324 NLRB 740 (1997) (authority to issue instructions and minor orders based on greater job skills does not amount to supervisory authority).

The record does not establish that the superintendent is held accountable for the work of the porters and handymen. That they are responsible to verify that the work had been completed is not sufficient to establish that they are evaluated or rewarded based on the handymen's work.

Where the possession of any one of the aforementioned powers is not conclusively established or in borderline cases, the Board looks to well-established secondary indicia as background evidence on the question of supervisory status but are not themselves dispositive of the issue in the absence of evidence indicating the existence of one of the primary or statutory indications of supervisory status. *Training School of Vineland,* 332 NLRB 1412 (2000). To the extent that the Employer argues that secondary indicia support its argument that the superintendent is a supervisor, the Employer has failed to show that the superintendent possesses secondary indicia of supervisory authority.

With respect to the Employer's contention that the superintendents are responsible for granting time off, their own witness testified that he merely acted as a conduit between the employees and Ramos.

It is well established that the ability to evaluate employees, without more, is insufficient to establish supervisory authority. This factor has been deemed unpersuasive in the absence of evidence that an employee's job was ever affected by such an evaluation. *Mount Sinai Hospital*, 325 NLRB 1136 (1998); *Williamette Industries*, 336 NLRB 160 (2001). In the instant case, while Negron may report poor work performance, no evidence shows that his report had a direct link with an employee's employment status.

Finally, the Employer's reliance on *Kaplan v. Local 68, International Union of Operating Engineers, AFL-CIO*, 220 NLRB 730 (1975), is misplaced. In that case, the superintendent was "totally in charge" of the assistant superintendent's work. Moreover, in that case, the Board noted that the building superintendent's recommendations regarding hire were usually followed and the superintendent's request to transfer an assistant was effectuated.

In contrast, in the instant case, the record shows that Negron does not order supplies or contract with outside vendors without consultation with office manager Ramos or managing agent Hanna. While the superintendent is responsible for all five buildings, the record evidence does not demonstrate that he effectively recommends the hire, discharge or discipline of employees. Rather, Negron works side-by-side with the porters and handymen to maintain the property. The superintendent's authority to transfer employees appears to be limited to emergency situations. Accordingly, the Employer has failed to carry its burden to show that the superintendent was granted or exercised any authority that would make him a supervisor under Section 2(11).

In conclusion, the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time porters, handymen and superintendents.

Excluded: All office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations.[2] Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[3] Those eligible shall vote on whether or not they desire to be represented for

[2] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules. requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

[3] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **March 7, 2008**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

collective-bargaining purposes by Local 890, LIFE.[4]

Dated at New York, New York
this February 29, 2008

/s/ _____
Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

[4] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **March 14, 2008.** The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with this Supplemental Decision for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.